Office Supreme Court, U.S.
FILED
MAY 6 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court Of The United States

MAY TERM, 1963

No. 1073

W. R. SIKES, SR., and W. R. SIKES, JR., PETITIONERS,

vs.

THOMAS C. RUTLAND, AS ADMINISTRATOR OF THE ESTATE OF GLENN RUBIN RUTLAND, deceased, RESPONDENT,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

A. FRANK LEVER, JR.
WILLIAM H. DUNCAN
J. REESE DANIEL
Counsel for Petitioners
West Columbia, S. C.

THE STATE PRINTING CO.

INDEX

	Page
Table of Citations	ii
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Reasons For Granting The Writ	3
Conclusion	6
Appendix	7

CITATIONS

Arnall Mills v. Smallwood, 68 F. (2d) 57	6
Attaway v. One Chevrolet 5-P Truck, 228 S.C. 559; 91 S.E. (2d) 270	4
Bonner v. Texas Co., 89 F. (2d) 291	6
Bussmann Mfg. Co. v. National Labor Relations Board, 111 F. (2d) 783	6
P. F. Collier & Son Co. v. Hartfeil, 72 F. (2d) 780	6
Cooper v. Georgia C&N Railway Co., 56 S.C. 91; 34 S.E. 16	4
Cudahy Packing Co. v. National Labor Relations Board, 116 F. (2d) 367	6
Davis v. F. W. Woolworth Co., 60 F. (2d) 344	5
Dubrock v. Interstate Motor Freight System, 143 F. (2d) 304	5
Erie Railroad Co. v. Tompkins, 304 U.S. 64	6
Flagg v. Chicago Great Western Ry. Co., 143 F. (2d) 90	5
General Outdoor Advertising Co. v. Frost, 76 F. (2d) 127	5

CITATIONS—Continued

	Page
Grand Trunk Western R. Co. v. Holstein, 67 F. (2d) 780	6
King Cotton Mills v. Wilson, 61 F. (2d) 1004	5
Leek v. New South Express Lines, 192 S.C. 527; 7 S.E. (2d) 459	4
Luper Transp. Co. v. Barnes, 170 F. (2d) 880	5
Massachusetts Protective Ass'n. v. Mouber, 110 F. (2d) 203	6
Metropolitan Life Ins. Co. v. Gosney, 101 F. (2d) 167	6
New York Life Ins. Co. v. King, 93 F. (2d) 347	6
New York Life Ins. Co. v. Roufos, 83 F. (2d) 620	6
Parramore v. Denver, etc., R. Wo., 5 F. (2d) 912	5
Prudential Ins. Co. of America v. King, 101 F. (2d) 990	6
Sinclair Prairie Oil Co. v. Thornley, 127 F. (2d) 128	5
Standard Oil Co. v. Burleson, 117 F. (2d) 421	5
Stanford v. Atlantic Life Ins. Co., 109 F. (2d) 428	5
Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865	6
Texarkana Bus Co. v. National Labor Relations Board, 119 F. (2d) 480	6
Thomson v. Stevens, 106 F. (2d) 739	6
Tucker Stevedoring Co. v. W. H. Gahagan, Inc., 6 F. (2d) 407	5
Williams v. Ford, 233 S.C. 304	4
F. W. Woolworth Co. v. Davis, 41 F. (2d) 342	5

IN THE

Supreme Court Of The United States

MAY TERM, 1963

No.

W. R. SIKES, SR., and W. R. SIKES, JR., PETITIONERS,

vs.

THOMAS C. RUTLAND, AS ADMINISTRATOR OF THE ESTATE OF GLENN RUBIN RUTLAND, deceased, RESPONDENT,

---

PETITION OF A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United State Court of Appeals for the Fourth Circuit, entered in the above entitled case on December 28, 1962.

CITATION TO OPINION BELOW

The opinion of the Circuit Court of Appeals printed in the Appendix hereto, is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 28, 1962. A timely petition for rehearing, filed January 28, 1963, was denied on February 5, 1963. (Appendix, p. 14). The jurisdiction of this Court is invoked under 28 USC, Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether circumstantial evidence which can lead to more than one conclusion is sufficient to sustain a verdict in federal courts in the face of state rules of decision to the contrary.

2. Whether contributory negligence fails as a complete bar to recovery by a plaintiff in federal courts where state decisions hold otherwise.

STATEMENT

This action was brought by the Plaintiff, a citizen of the State of Georgia, as Administrator of the Estate of Glenn Rubin Rutland, deceased, against the Defendants, both residents of the State of South Carolina, for the wrongful death of Glenn Rubin Rutland under Section 10-1951, Code of Laws of South Carolina 1952 for the benefit of and with the consent of the United States Fidelity and Guaranty Company to the extent of payments made by it under the Workmens Compensation Act of the State of South Carolina, and for the benefit of the mother and father of the deceased as provided by Section 10-1952 Code of Laws of South Carolina 1952 to the extent of any excess recovery over and above the amount to which the workmens compensation carrier would be entitled. The jurisdiction of the District Court was invoked because of diversity of citizenship.

By consent, the case was tried without a jury before the Honorable C. C. Wyche, District Judge sitting by designation in the Orangeburg Division of the United States District Court for the Eastern District of South Carolina.

This action arose from a head-on collision between two dump trucks on Interstate Highway I-26 approximately four (4) miles north of Orangeburg, South Carolina, on July 15, 1960, while the highway was under construction. The trucks were operated by Plaintiff's deceased, Glenn Rubin Rutland, and William Glover, deceased, who was driving the truck owned by the Defendant, W. R. Sikes, Sr.; at the time of the collision, both Rutland and Glover

were employed on the construction of the highway. At this time the highway was not open to the public. W. R. Sikes, Jr., originally obtained employment for Glover on the construction job, but at the time of the accident Glover was carried on the records of subcontractor, J. C. Braxton, as his employee.

Both the drivers were killed in the collision, and there were no eye witnesses to the accident itself. There was no testimony as to how or why the vehicles came to collide.

At the close of Plaintiff's testimony, the Defendants moved for an involuntary dismissal on the grounds that Plaintiff had failed to show that he was entitled to relief. This motion was renewed at the close of all of the testimony and both times was taken under advisement by the Court.

The District Court on January 13, 1962, issued its Findings of Act, Conclusions of Law and Order, finding that the driver, Glover, was the agent of the Defendants, that the driver Glover, was negligent and reckless which was the proximate cause of the death of Plaintiff's intestate, that Plaintiff's intestate was not negligent nor reckless, and that Plaintiff had been damaged to the extent of Twenty One Thousand and No 100 ($21,000.00) Dollars.

From the findings of fact, conclusions of law and order, an appeal was taken to the Fourth Circuit Court of Appeals.

The Court below affirmed the judgment of the District Court in an opinion which cites no authority. (Appendix, p. 7).

Petitioners then filed a timely petition with the Court below for a rehearing, and on February 5, 1963, the Court below entered its order denying a rehearing, again without citation of authority. (Appendix, p. 14).

REASONS FOR GRANTING THE WRIT

1. *The Decision is not in accord with applicable state court decisions.*

The decision of the court below in the instant case is in

direct conflict with the opinions of the South Carolina Supreme Court in regard to circumstantial evidence as set forth in *Williams v. Ford*, 233 S. C. 304, and *Leek v. New South Express Lines*, 192 S. C. 527, 7 S. E. (2d) 459; and *Attaway v. One Chevrolet 5-P Truck*, 228 S. C. 559, 91 S. E. (2d) 270; and are in direct conflict with the opinions of the Supreme Court of South Carolina as to contributory negligence as set forth in the case of *Cooper v. Georgia C & N Railway Co.*, 56 S. C. 91, 34 S. E. 16.

Both of these questions involve the application of state law. The opinion of the Court below is in direct conflict with applicable state decisions on the issues, and if allowed to stand will create confusion and conflict between state and federal courts, with one body of substantive law for one and another for the other.

Clearly, the questions presented are of importance in the trial of cases in the federal courts where jurisdiction is based on diversity, where state tort law is applicable. Settlement of the questions by this Court is plainly in the public interest since a large percentage of cases tried in district courts involve diversity cases sounding in tort, to which state law must apply if injustice is to be avoided.

2. *The Decision is in conflict with the decisions of other circuits.*

The decision of the Court below establishes a doctrine of contributory negligence which is in substantial conflict with the law as set out by other circuit courts. The Court's opinion implies that there was excessive speed on the part of both drivers, the Court's language being that defendant was "a substantial contributor to that relative speed." (Appendix, p. 9). The fact that defendant could also have been negligent in some other fashion would not inure to the benefit of plaintiff if he himself were negligent and his negligence contributed as a proximate cause to his damages.

Other circuits have unanimously held that in the absence of statutes to the contrary, contributory negligence bars recovery and relieves the defendant of all liability.

Third Circuit: *Dubrock v. Interstate Motor Freight System*, 143 F. (2d) 304;

Fourth Circuit: *King Cotton Mills v. Wilson*, 61 F. (2d) 1004;

Fifth Circuit: *General Outdoor Advertising Co. v. Frost*, 76 F. (2d) 127; *Luper Transp. Co. v. Barnes*, 170 F. (2d) 880; *Standard Oil Co. v. Burleson*, 117 F. (2d) 412; *Stanford v. Atlantic Life Ins. Co.*, 109 F. (2d) 428;

Eighth Circuit: *Flagg v. Chicago Great Western Ry. Co.*, 143 F. (2d) 90;

Tenth Circuit: *Davis v. Woolworth Co.*, 60 F. (2d) 344; *Parramore v. Denver, etc., R. Co.*, 5 F. (2d) 912; *Sinclair Prairie Oil Co. v. Thornley*, 127 F. (2d) 128; *F. W. Woolworth Co. v. Davis*, 41 F. (2d) 342;

The Decision of the Court below was apparently predicated on the conclusion that circumstantial evidence which leads to a reasonable inference is sufficient to sustain a finding of fact. In reaching this conclusion, it is respectfully submitted that the Court overlooked the law applicable to circumstantial evidence generally and in South Carolina particularly.

Most authorities hold that a conclusion is not supported by circumstantial evidence unless the facts relied on are of such a nature, and so related to each other, that no other conclusion can fairly or reasonably be drawn from them. For circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and sufficient probative force to constitute the basis for a legal inference and not for mere speculation. Circumstantial evidence is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion, or where the circumstances give equal support to inconsistent conclusions or are equally consistent with contradictory hypotheses.

The decisions of the other circuits are in accord with South Carolina, and in direct conflict with the Court below.

Third Circuit: *Tucker Stevedoring Co. v. W. H. Gahagan, Inc.* 6 F. (2d) 407;

Fifth Circuit: *Arnall Mills v. Smallwood*, 68 F. (2d) 57; *Bonner v. Texas Co.*, 89 F. (2d) 291;

Sixth Circuit: *Grand Trunk Western R. Co. v. Holstein*, 57 F. (2d) 780; *New York Life Ins. Co. v. Roufos*, 83 F. (2d) 620;

Eighth Circuit: *Bussmann Mfg. Co. v. National Labor Relations Board*, 111 F. (2d) 783; *P. F. Collier & Son Co. v. Hartfeil*, 72 F. (2d) 625; *Cudahy Packing Co. v. National Labor Relations Board*, 116 F. (2d) 367; *Massachusetts Protective Assn. v. Mouber*, 110 F. (2d) 203; *Metropolitan Life Ins. Co. v. Gosney*, 101 F. (2d) 167; *New York Life Ins. Co. v. King*, 93 F. (2d) 347; *Prudential Ins. Co. of America v. King*, 101 F. (2d) 167; *Texarkana Bus Co. v. National Labor Relations Board*, 119 F. (2d) 480; *Thomson v. Stevens*, 106 F. (2d) 739;

3. *The Decision is not in accord with decisions of this Court*:

The Court below has ignored the clear mandate of this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, to apply state law in diversity cases. The opinion of the Court below and the order denying rehearing do not cite the state court decisions, but expressly ignore them and, in effect, create a new body of law applicable only to federal courts within the Fourth Circuit. This is the evil which this Court corrected in *Erie v. Tompkins, supra.* To allow this decision to stand will speed the erosion of the *Erie* doctrine, a process apparently already underway. The ultimate result will be a return to those "mischievous results" so succinctly stated by Mr. Justice Brandeis in *Erie*, and a retrogradation to *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865, which as this Court said, "rendered impossible, equal protection of the law."

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,
A. FRANK LEVER, JR.
J. REESE DANIEL
WILLIAM H. DUNCAN

INDEX TO APPENDIX

	Page
Opinion of Court Below	7
Petition for Rehearing	10
Order Denying Rehearing	14

OPINION

Filed December 28, 1962.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

HAYNSWORTH, Circuit Judge:

The defendants in this action for wrongful death appeal from a judgment for the plaintiff. They question the sufficiency of the evidence to sustain the finding that they are responsible as masters for the acts of the driver of their truck and the further finding that the negligence of the driver of their truck was the proximate cause of the death of the plaintiff's decedent.

We think the evidence supports the findings of the District Judge, before whom the case was tried without a jury.

This action arose out of a head-on collision between two dump trucks, each of which was engaged in work in connection with the construction of a new highway in South Carolina. The driver of each truck was killed. Since there were no eyewitnesses, the findings of the District Judge as to the cause of the accident rest upon circumstantial evidence.

The circumstantial evidence, however, is persuasive and fully warrants the inferences drawn by the District Court.

The highway under construction was a part of the Interstate Highway System. In the area in question, the northbound lanes had been fully graded and a sand-clay base defining the roadbed was in place and usable for vehicular traffic engaged in construction activities. Braxton, a subcontractor, was engaged at the time in moving sand, clay or earth in dump trucks over the bed of the northbound lanes for a distance of some miles between the place where the materials were available and the point at which they were required in connection with extension of the work. For this purpose, he had engaged others to supply trucks

and drivers to him. Among others, the defendants supplied several such trucks with drivers for this purpose, and the younger Mr. Sikes also, at times, served as one of the drivers.

For their services, the defendants were compensated on the basis of a fixed price per yard of earth moved. The younger Mr. Sikes was frequently, but not always, on the job, and, as noted, he sometimes drove one of the defendants' trucks. The drivers were employed by the defendants, and were subject to supervision and discharge by them. When Mr. Sikes, Jr. was not on the job, Braxton would issue instructions to the drivers as to what materials they should pick up and where it should be placed, but such general instructions are far from the specific assumption of immediate control which is required to bring into play the borrowed servant doctrine and to relieve the general employer from responsibility for the acts of his servant.

It also appears that the drivers engaged in driving the defendants' trucks were carried on Braxton's payrolls, but the testimony discloses that this was done solely for the purpose of enabling Braxton to certify that the drivers had been paid the minimum wages required by the federal statutes. Such disbursements by Braxton were deducted from the amounts determined to be due the defendants on the basis of the number of yards of material they moved in their trucks. Under these circumstances, we think it plain that the driver of the defendants' truck involved in the accident was on the business of the defendants and was subject to their supervision and control. It follows that the defendants may not be relieved from responsibility for his acts under the borrowed servant doctrine.

At the time of the accident, the defendants' dump truck was fully loaded and was proceeding along the sand-clay surface of the northbound lanes in the direction of the place where the material was to be placed. An empty dump truck, owned by one Covington and driven by the plaintiff's decedent, was proceeding in the opposite direction

to pick up a new load of material. The head-on collision between the two dump trucks occurred well to the right of the center line of the roadway, viewed from the point of view of the plaintiff's decedent. Indeed, the location of the trucks after the accident and the tire tracks leading up to the point of impact, indicate that the truck of the plaintiff's decedent was partially on the shoulder on his side of the roadway.

Extensive damage to the trucks, the fatal injury of both drivers, and the fact that the loaded body of the defendants' truck was hurled some distance from the chassis of that truck, suggest that the relative speed of the trucks was high, and that the defendants' truck was, at least, a substantial contributor to that relative speed.

The defendants do not deny, indeed, in light of the evidence at the scene, they could not deny, that their driver was far over on the wrong side of the road. They challenge the sufficiency of the evidence to establish the fault of their servant on the ground that the South Carolina statutes prescribing the rules of the road, as construed by them, do not apply to highways under construction and not yet open for public use, and, on the further ground that the evidence does not disclose the circumstances under which their driver moved over well to the left of the center line of the roadway.

If we may accept the defendants' contention that South Carolina's statute requiring motorists to drive to the right of the center line of any roadway used by vehicles proceeding in opposite directions does not apply to a roadway under construction and not yet open for use by the general public, the requirement that vehicles drive to the right when meeting traffic proceeding in the opposite direction on the same roadway is so nationally uniform that, without the statute, due care requires a driver facing oncoming traffic on such a roadway to proceed on his righthand side of the center line of the roadway. He could not rationally expect the drivers of oncoming vehicles to depart from their deeply ingrained habits and reverse the procedure for

safely meeting and passing traffic proceeding in the opposite direction.

Since there were no eyewitnesses, one may speculate that there may have been some sudden emergency which caused the defendants' servant to move over on the wrong side of the roadway, but the fact that he was on the wrong side of the road when he collided with the truck driven by the plaintiff's decedent warrants an inference of fault upon his part. The fact that there were no eyewitnesses does not deprive the finder of fact of the power of drawing reasonable inferences founded upon common experience from the circumstantial evidence, and the exercise of this power is not made insupportable by speculative assumptions that extraordinary circumstances might have existed, which, if established, would make the inference untenable.

No one may say with absolute certainty why the defendants' servant got so far over on the wrong side of the highway, but it is undeniable that he was driving at substantial speed far over on the wrong side of the road where, ordinarily in the face of an approaching vehicle, he had no right to be, while the plaintiff's decedent was driving to his right of the center line of the roadway, or partially on the shoulder on his side of the roadway, where, in an effort to safely meet and pass the defendants' truck, he had ever right to be.

Under these circumstances, the findings of fault on the part of the defendants' servant and the absence of contributory negligence on the part of the plaintiff's decedent were fully warranted.

Affirmed.

PETITION FOR REHEARING

The Petitioner Prays That This Court Grant A Rehearing Of Its Decision Of December 28, 1962, Affirming The Judgment Of The District Court As To That Portion Of The Opinion On Page Two (2) Of Said Opinion, Paragraphs Three (3) And Four (4) Reading As Follows:

"This action arose out of a head-on collision between two dump trucks, each of which was engaged in work

in connection with the construction of a new highway in South Carolina. The driver of each truck was killed. Since there were no eyewitnesses, the findings of the District Judge as to the cause of the accident rest upon circumstantial evidence.

"The circumstantial evidence, however, is persuasive and fully warrants the inferences drawn by the District Court."

Also As To That Portion Of The Opinion Contained In Paragraph Two (2) On Page Five (5), Reading As Follows:

"Since there were no eyewitnesses, one may speculate that there may have been some sudden emergency which caused the defendants' servant to move over on the wrong side of the roadway, but the fact that he was on the wrong side of the road when he collided with the truck driven by the plaintiff's decedent warrant an inference of fault upon his part. The fact that there were no eyewitnesses does not deprive the finder of fact of the power of drawing reasonable inferences founded upon common experience from the circumstantial evidence, and the exercise of this power is not made insupportable by speculative assumptions that extraordinary circumstances might have existed, which, if established, would make the inferences untenable."

Also As To That Portion Of The Opinion Contained In The Second (2nd) Paragraph Of Page Four (4) Reading As Follows:

"Extensive damage to the trucks, the fatal injury of both drivers, and the fact that the loaded body of the defendants' truck was hurled some distance from the chassis of that truck suggest that the relative speed of the trucks was high, and that the defendants' truck was, at least, a substantial contributor to that relative speed."

The Petition Is Based On The Grounds Hereinafter Set Forth.

FIRST.

Circumstantial Evidence Must Lead To One Conclusion With Reasonable Certainty.

The Decision of this Court was apparently predicated on the conclusion that circumstantial evidence which leads to a reasonable inference is sufficient to sustain a finding of fact. In reaching this conclusion, it is respectfully submitted that the Court overlooked the law applicable to circumstantial evidence generally and in South Carolina particularly.

Most authorities hold that a conclusion is not supported by circumstantial evidence unless the facts relied on are of such a nature, and so related to each other, that no other conclusion can fairly or reasonably be drawn from them. For circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty and sufficient probative force to constitute the basis for a legal inference and not for mere speculation. Circumstantial evidence is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion, or where the circumstances give equal support to inconsistent conclusions or are equally consistent with contradictory hypotheses. 32 CJS 1101, 1102.

As shown by the Opinion of the Court set out above, the evidence would support defendants' hypothesis equally as well as that of plaintiff and the defendant should be entitled to the benefit of the doubt.

The South Carolina Supreme Court, in the 1958 decision of *Williams vs. Ford*, 233 S.C. 304, 104 S. E. (2d) 378, at page 382 of the Southeastern Reporter, states:

> "To warrant a conclusion sought to be established in a civil case by circumstantial evidence, the facts and circumstances disclosed by such evidence must be such as, considered in the light of ordinary experience, would lead with reasonable certainty to such conclusion, and not leave it to mere speculation or conjecture. *Leek v. New South Express Lines*, 192 S.C. 527,

7 S. E., (2d) 459; *Attaway v. One Chevrolet 5-P Truck*, 228 S.C. 559, 91 S. E. (2d) 270.

"The conclusion thus sought to be established here was, under the allegations of the complaint, that decedent, while walking in a northerly direction on the left side or left shoulder of the highway, facing southbound traffic as required by law for pedestrians, had been negligently and recklessly run down from the rear by the defendants' truck, which was on its wrong side of the road. In support of that conclusion the plaintiff, of necessity, relied solely upon the physical evidence found on the highway immediately or very shortly after the accident. That evidence was perfectly consistent with the direct, uncontradicted and unimpeached testimony of the defendants' eyewitnesses. We agree with the trial judge that it failed to meet the probative requirements before mentioned."

SECOND

In South Carolina, Contributory Negligence Is A Complete Bar To Recovery By A Plaintiff.

It is respectfully submitted that the decision of this Court apparently overlooked the doctrine of contributory negligence as applicable under South Carolina law and applied the doctrine of comparative negligence. The Court's opinion as noted above on page four (4) implies that there was excessive speed on the part of both drivers, the Court's language being that defendant was "a substantial contributor to that relative speed." The fact that defendant could also have been negligent in some other fashion would not inure to the benefit of plaintiff if he himself were negligent and his negligence contributed as a proximate cause to his damages.

Contributory negligence will, if existing to any extent, defeat recovery. *Cooper v. Georgia C & N Railway Co.*, 56 S.C. 91, 34 S. E. 16; *Gladden v. Southern Railway* 142 S.C. 492, 141 S. E. 90.

CONCLUSION

For the reasons set forth above and in the Brief filed by Appellants, it is respectfully urged that a rehearing be granted, and that upon such rehearing, the judgment of the District Court be reversed.

Respectfully submitted,

J. Reese Daniel
William H. Duncan
Attorneys for Petitioner

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing Petition for Rehearing is presented and filed in good faith and not for delay.

J. Reese Daniel
William H. Duncan
Attorneys for Petitioner

ORDER

The Court having heretofore on December 28, 1962 entered its judgment and filed an opinion in the above entitled case and a petition for rehearing having been filed on January 28, 1963;

Now, Therefore, upon consideration of the petition for rehearing,

IT IS ORDERED that the petition for rehearing be, and the same hereby is, denied.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

ALBERT V. BRYAN
United States Circuit Judge

OREN R. LEWIS
United States District Judge

February 4, 1963
Filed February 5, 1963
R. M. F. WILLIAMS, JR., *Clerk*

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
MAY 27 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

MAY TERM, 1963

No. 1073

W. R. SIKES, SR., AND W. R. SIKES, JR., PETITIONERS,

versus

THOMAS C. RUTLAND, AS ADMINISTRATOR OF THE ESTATE OF GLENN RUBIN RUTLAND, DECEASED, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

HENRY HAMMER,
Columbia, S. C.,
MARSHALL B. WILLIAMS,
LOFTON M. FANNING,
W. T. KLAPMAN,
Orangeburg, S. C.,
Attorneys for Respondent.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

	Page
Table of Citations	ii
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Argument	3
Conclusion	5

TABLE OF CASES

	PAGE
Anderson v. Davis, 229 S. E. 223, 92 S. E. (2d) 469	4
Attaway v. One Chevrolet 5-P Truck, 228 S. C. 559, 91 S. E. (2d) 270	3
Dawson v. S. C. Power Company, 220 S. C. 26, 66 S. E. (2d) 322	4
Fuller v. Bailey, 237 S. C. 573, 118 S. E. (2d) 340	4
Gillespie v. Ford, 225 S. C. 105, 81 S. E. (2d) 44	4
Leek v. New South Express Lines, 192 S. C. 527, 7 S. E. (2d) 459 3,	4
Thompson v. Brewer, 225 S. C. 460, 82 S. E. (2d) 685 ..	4
Williams v. Ford, 223 S. C. 304, 104 S. E. (2d) 378	3

Supreme Court of the United States

MAY TERM, 1963

No. 1073

W. R. SIKES, SR., AND W. R. SIKES, JR., PETITIONERS,

versus

THOMAS C. RUTLAND, AS ADMINISTRATOR OF THE ESTATE OF GLENN RUBIN RUTLAND, DECEASED, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

CITATION OF OPINION BELOW

The opinion of the Circuit Court of Appeals printed in the Appendix of the petition of the petitioners is not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition of Petitioners.

QUESTIONS PRESENTED

For the purpose of this Brief the respondent will treat the questions presented as if the conclusions drawn from the testimony by the petitioners could be sustained by the testimony, however, the respondent specifically denies that under the testimony in the case these conclusions could be sustained; further, respondent would respectfully submit that the questions presented would be more correctly stated as follows:

1. Whether circumstantial evidence which can lead to more than one conclusion is sufficient to sustain a verdict in Federal Courts when the controlling decisions of the State Supreme Court is to that effect.

2. Whether contributory negligence is a bar to recovery where it is not proved and where by the finding of punitive damages by the trial court a finding of gross negligence was made as to the defendant and contributory gross negligence was not plead as a defense.

STATEMENT

In this action, Thomas C. Rutland, as Administrator of the Estate of Glenn Rubin Rutland, deceased, sought to recover damages for the death of the said Glenn Rubin Rutland, under Section 10-1951 of the 1952 Code of Laws for the State of South Carolina, as amended. It was alleged that the injuries and death of the deceased were due to the negligent and grossly negligent operation of a truck by an agent or servant of the defendants. The defendants, in due course, answered the Complaint pleading as one of their defenses contributory negligence—the defendants did not plead contributory "gross" negligence as a defense.

The matter proceeded to trial before the Honorable C. C. Wyche, District Judge, by consent of the parties without a jury, and resulted in a verdict, dated January 13,

1962, by the Trial Judge in which an award of Twenty Thousand Dollars ($20,000.00) actual damages and One Thousand Dollars ($1,000.00) punitive damages for the plaintiff was made by the Trial Judge.

In due course an appeal was made to the United States Circuit Court of Appeals for the Fourth Circuit and the verdict was sustained in an opinion by Judge Haynesworth filed December 28, 1962; timely motion for a rehearing was made which was denied by order of said Court dated February 4, 1963, this petition follows:

ARGUMENT

The respondent would respectfully submit that the petition of the petitioners should be dismissed in that there is no conflict between the decision as handed down by the United States Circuit Court of Appeals for the Fourth Circuit and the law announced by the Supreme Court of the State of South Carolina which the petitioners concede is the controlling law in this case.

In the case of *Leck v. New South Express Lines*, 192 S. C. 527, 7 S. E. (2d) 459, at page 462, the South Carolina Supreme Court stated the rule for circumstantial evidence as follows: "The rule of criminal law that where circumstantial evidence is relied upon, the facts proved must be such as to preclude every other hypothesis but the guilt of the accused does not apply in civil cases. **In civil actions every other reasonable conclusion need not be excluded;** proof of circumstances warranting a given inference is sufficient in such cases." (Emphasis added.)

Leck v. New South Express Lines, 192 S. C. 527, 7 S. E. (2d) 462, has been consistently followed and cited as authority in *Attaway v. One Chevrolet 5-P Truck*, 228 S. C. 559, 91 S. E. (2d) 270; *Williams v. Ford*, 233 S. C. 304, 104

S. E. (2d) 378; *Fuller v. Bailey*, 237 S. C. 573, 118 S. E. (2d) 340.

In view of the law as stated in the case of *Leek v. New South Express Lines*, 192 S. C. 527, 7 S. E. (2d) 459, which is cited by petitioner and recognized as one of the leading cases concerning circumstantial evidence in the State of South Carolina and in view of the fact that the petitioners in their petition make no claim that the conclusion reached by the Trial Judge was not a reasonable inference we would respectfully submit that the question presented as **Number I** by the petitioners is without merit.

In the petition of the petitioners there is no claim made that the trial or appellate court found facts upon which their plea of contributory negligence could be based. In order for the Court to hold that contributory negligence would bar recovery in this instance it would be necessary for the petitioners to have shown that there was no gross negligence on the part of petitioners and that contributory negligence existed on the part of respondent and was a contributing proximate cause of the injury. *Gillispie v. Ford*, 225 S. C. 105, 81 S. E. (2d) 44.

Able counsel for the petitioners concede that in this case the law of the State of South Carolina is controlling yet in the petition filed with the Honorable Court they ignore the fact that implicit in the verdict of the Trial Court by its finding of punitive damages against the petitioners, there was a finding of gross negligence, and also the Trial Court found as a fact that there was gross negligence on the part of petitioners. Contributory negligence is not a defense to recklessness or gross negligence on the part of the defendant. *Dawson v. South Carolina Power Company*, 220 S. C. 26, 66 S. E. (2d) 322; *Thompson v. Brewer*, 225 S. C. 460, 82 S. E. (2d) 685; *Anderson v. Davis*, 229 S. C. 223, 92 S. E. (2d) 469.

In view of the foregoing it is respectfully submitted that since the petitioners have failed to plead, as a defense to this action, gross negligence and make no argument in their petition that a finding of gross negligence against the petitioners by the Trial Court, which was upheld by the appellate Court, was improper we would respectfully submit that there is no merit as to the Second Question presented.

CONCLUSION

There is no conflict in the decision rendered by the United States Court of Appeals for the Fourth Circuit in this case and the applicable principles of law as enunciated by the decisions of the Supreme Court of South Carolina, and it is respectfully submitted that the petititon of the petitioners should be dismissed.

Respectfully submitted,

HENRY HAMMER,
Columbia, S. C.,
MARSHALL B. WILLIAMS,
LOFTON M. FANNING,
W. T. KLAPMAN,
Orangeburg, S. C.,
Attorneys for Respondent.